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10/699,335	10/31/2003	Anthony J. Cafferata	J-3763	5399

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EXAMINER
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FIDEI, DAVID

ART UNIT	PAPER NUMBER
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3728

DATE MAILED: 09/21/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

**Application No.**

10/699,335

**Applicant(s)**

CAFFERATA ET AL.

**Examiner**

David T. Fidei

**Art Unit**

3728

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 03 July 2006.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-16 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-16 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |                                                                                                            |                                                                                         |
|------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                                           | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                       | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____                                                |

## DETAILED ACTION

### *Claim Rejections - 35 USC § 102*

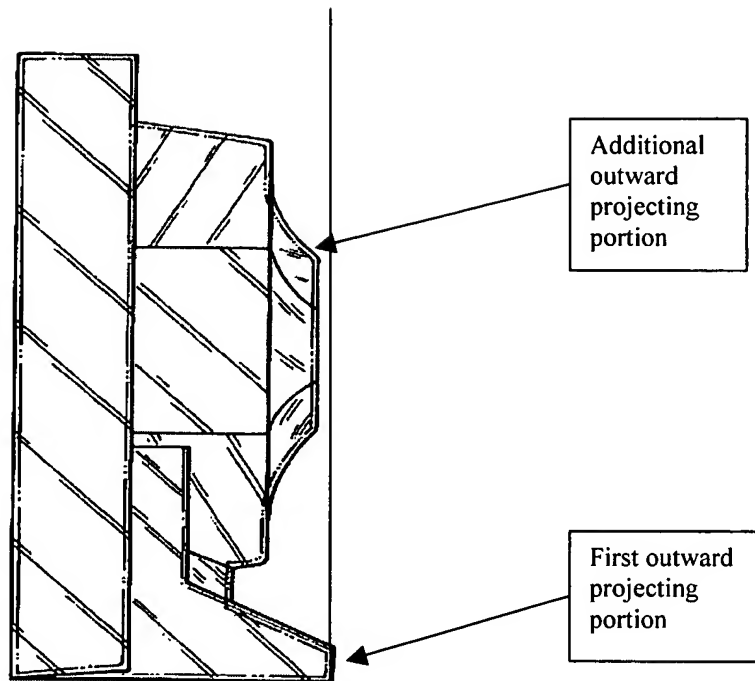
1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

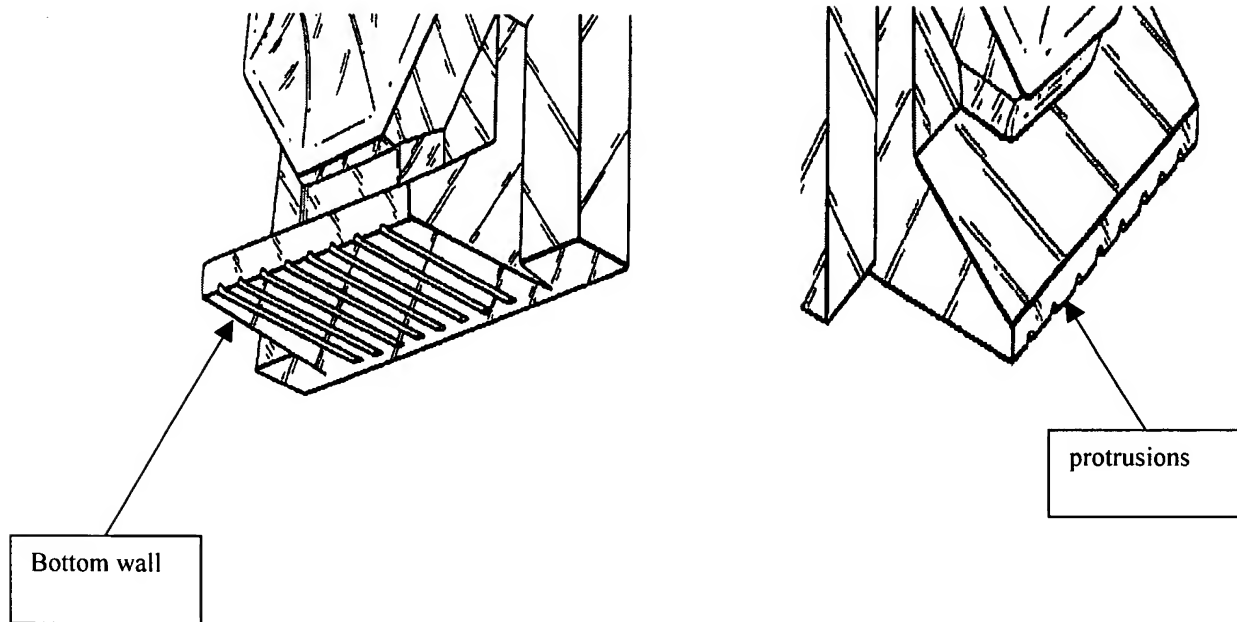
2. Claims 1-12 are rejected under 35 U.S.C. 102(b) as being anticipated by Humphrey (Patent no. D447,408). As to claims 1 and 2 a package for containing and displaying at is disclosed comprising a back panel, and a front panel attached to said back panel, wherein said front panel comprises a blister pack formed of plastic and including a first outward projecting portion in a bottom portion of said blister pack and at least one additional outward projecting portion having a depth and shape conforming to at least a portion of said at least one article, wherein at least a portion said first outward projecting portion extends widthwise at least a substantial portion between a first side of said blister pack and a second side of said blister pack, and has a depth outward sufficient to allow said package to stand substantially upright. As shown by the figure below the depth of said at least a portion of said first outward projecting portion is equal to or greater than an outermost projecting portion of the depth of said at least one additional outward projecting portion



As to claim 3, a package is shown above according to claim 1 wherein said at least one additional outward projecting portion is continuous with said first outward projecting portion.

As to claim 4, a blister pack according to claim 2 is shown wherein said at least one additional outward projecting portion is continuous with said first outward projecting portion.

As to claim 5, a package according to claim 1 wherein said first outward projecting portion includes a bottom wall having integral therein at least two spaced apart downward protrusions, see the figure below



As to claim 6, a blister pack is shown according to claim 2 wherein said first outward projecting portion includes a bottom wall having integral therein at least two spaced apart downward protrusions. As shown above there are a plurality of protrusions in as much as is claimed.

As to claims 7 and 8, a package according to claims 1 and 2 is shown where the first outward projecting portion includes a front wall of uniform depth.

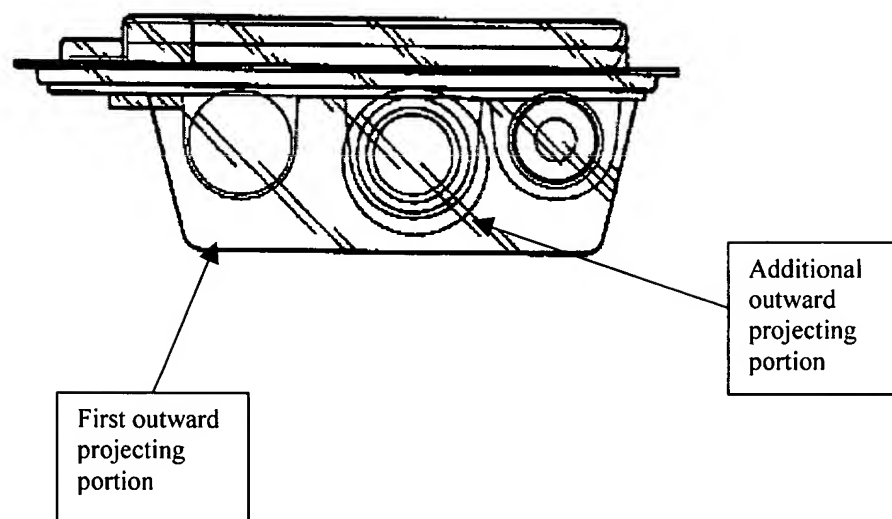
As to claims 9 and 10, one of said portions of non-uniform depth is a wall of one of said at least one additional outward projecting portion

As to claims 11 and 12, the first portion is substantially rectangular when view from the front side in as much as is claimed.

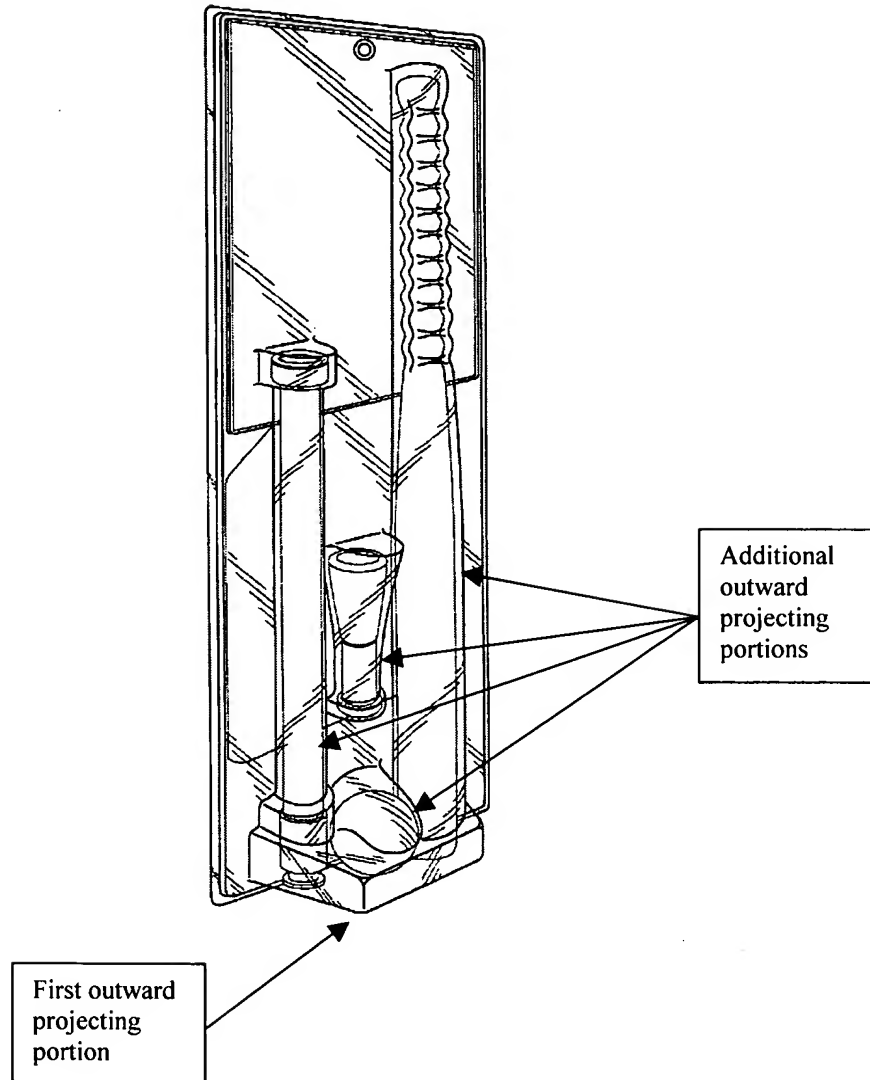
3. Claims 1-4, 7-12, 15 and 16 are rejected under 35 U.S.C. 102(e) as being anticipated by Udwin et al (Patent no. D467,494). As to claims 1 and 2 a package for containing and displaying

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at is disclosed comprising a back panel, and a front panel attached to said back panel, wherein said front panel comprises a blister pack formed of plastic and including a first outward projecting portion in a bottom portion of said blister pack and at least one additional outward projecting portion having a depth and shape conforming to at least a portion of said at least one article, wherein at least a portion said first outward projecting portion extends widthwise at least a substantial portion between a first side of said blister pack and a second side of said blister pack, and has a depth outward sufficient to allow said package to stand substantially upright. As shown by the figure below the depth of said at least a portion of said first outward projecting portion is equal to or greater than an outermost projecting portion of the depth of said at least one additional outward projecting portion



**FIG. 1**



As to claims 3 and 4, a package is shown above according to claims 1 and 2 wherein said at least one additional outward projecting portion is continuous with said first outward projecting portion.

As to claims 7 and 8, a package according to claims 1 and 2 is shown where the first outward projecting portion includes a front wall of uniform depth.

As to claims 9 and 10, one of said portions of non-uniform depth is a wall of one of said at least one additional outward projecting portion

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As to claims 11 and 12, the first portion is substantially rectangular when view from the figure on the previous page in as much as is claimed.

As to claim 15 and 16, a package is shown in the figure on page 7 where said at least one additional outward projecting portions are present, on either side of the middle additional projection portion, wherein said two of said at least two additional outward projecting portions are of different depths from each other.

4. Claims 1-10 are rejected under 35 U.S.C. 102(b) as being anticipated by Glassman (Publication no. US 2001/0007308). As to claims 1 and 2 a package for containing and displaying at is disclosed comprising a back panel, and a front panel 12 attached to said back panel 14, wherein said front panel comprises a blister pack formed of plastic and including a first outward projecting portion (the bottom part of 12a in figure 1) in a bottom portion of said blister pack and at least one additional outward projecting portion having a depth and shape conforming to at least a portion (the top part of 12a in figure 1) of said at least one article, wherein at least a portion said first outward projecting portion extends widthwise at least a substantial portion between a first side of said blister pack and a second side of said blister pack, and has a depth outward sufficient to allow said package to stand substantially upright.

As to claims 3 and 4, a package is shown above according to claims 1 and 2 wherein said at least one additional outward projecting portion is continuous with said first outward projecting portion.

As to claims 5 and 6, two protrusions are shown in figures 1 and 5, #'s 38, 40, 76 and 78

As to claims 7 and 8, a package according to claims 1 and 2 is shown where the first outward projecting portion includes a front wall of non-uniform depth.

As to claims 9 and 10, one of said portions of non-uniform depth includes said at least one additional outward projecting portion

#### ***Claim Rejections - 35 USC § 103***

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:



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(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

6. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

7. Claims 13 and 14 are rejected under 35 U.S.C. 103(a) as being unpatentable over Perkins (US Patent no. 4,781,289). As to claims 13 and 14 Perkins discloses a package for containing and displaying at least one article comprising a back panel 12 and a front panel attached to said back panel defining a blister 18. A first outward projecting portion in a bottom portion of the blister is defined by support structure 22 and at least one additional outward projecting portion having a depth and shape conforming to at least a portion of the at least one article is defined by enclosure 20. Col. 3, lines 8-10 states the depth of support structure 22 should be comparable to the depth of product enclosure 20. To the extent that this is not viewed as setting forth a projecting portion 20 equal in depth to a greatest depth in the first outward projecting portion, such a difference would have involved a mere change in the size of a component. A change in size is generally recognized as being within the level of ordinary skill in the art. In re Rose, 105 USPQ 237 (CCPA 1955). Also, it has been held that where the only difference between the prior art device and the claimed device was a recitation of relative dimensions, the claimed device was not patentably distinct from the prior art device, *Gardner v. TED Systems, Inc.*, 725 F.2d 1338, 220 USPQ 777 (Fed. Cir. 1984), cert. Denied, 469 U.S. 830, 2325 USPQ 232 (1984), see M.P.E.P. 2144.04 (IV).

***Response to Arguments***

8. Applicant's arguments filed July 3, 2006 have been fully considered but they are not persuasive.

With regard to claims 13 and 14, it is acknowledged the amendments thereto overcome the prior mentioned deficiencies under of §112, ¶ 2. Claims 13 and 14 have been amended to forth a projecting portion equal in depth to a greatest depth in the first outward projecting portion to render said package self-indexing when said package is aligned with one or more packages having a structure of said package. Accordingly, there exists no ambiguity as to what parameters are set forth.

9. Claims 1-12 under 35 U.S.C. 102(b) as being anticipated by Humphrey (Patent no. D447,408). It is not seen where Humphrey fails to provide a "self-indexing" as argued on page 11 of applicant's response. Applicant is heard to hold that the blister packs of Humphrey can not anticipate the claimed invention because Humphrey only echoes the shortcomings of the prior art where "toppling forward or being crushed" results in a mess display. Attention is also directed to the "Background of the Invention" in this regard by Applicant.

As the Federal Circuit has observed, "the name of the game is the claim," *In re Hiniker Co.*, 150 F.3d 1362, 1369, 47 USPQ2d 1523, 1529 (Fed. Cir. 1998). In this regard Applicants' sole point of novelty in the claims at bar resides in a "depth of said at least a portion of said first outward projecting portion is configured in relation to a depth of an outermost projecting portion of said at least one additional outward projecting portion so that said package is self-indexing when said package is aligned with one or more packages having a structure of said package".

Which appears to be a lot of verbiage of notoriety. However when one goes to the present disclosure page 10, line 28 to page 11, line 4 to ascertain the "self-indexing" parameters for the purposes of providing indexing based on foot 5, the **depth y** of the foot "should be equal to **or greater than**" the greatest depth of the article compartments which in the embodiments of figures 1-3 is the **depth z'**. The foot of Humphrey, depicted in the above rejection, is at least equal to **or greater than** that of the greatest depth of the additional outward projecting portion. It not understood where Humphrey fails to address any limitations of the claims gleaned through

the described meaning of the present disclosure. Particularly in light of Applicants' broad allegations urging otherwise. Accordingly, the rejection is maintained and made final.

10. Claims 1-4, 7-12, 15 and 16 under 35 U.S.C. 102(e) as being anticipated by Udwin et al (Patent no. D467,494). Again Applicant asserts the Examiner has failed to address the limitations of the relative depth proportions to render the package "self-indexing". Page 12 of the response states as is clear from figures 4 and 5, the bottom portion (of Udwin) has a depth greater than a depth of any other outward portion of the pack. Admittedly, so. And this is not envisioned in Applicant's own disclosure?

Again, looking to the written description page 10, line 28 to page 11, line 4 to ascertain the "self-indexing" parameters for the purposes of providing indexing based on foot 5, the depth of the foot "should be equal to or greater than" the greatest depth of the article compartments which in the embodiments of figures 1-3 is the depth  $z'$ . It is not clear what Applicant seeks to have the prior art provide that is any different than their invention in as much as is claimed and disclosed. In any event this rejection is maintained and made final.

11. Claims 1-10 under 35 U.S.C. 102(b) as being anticipated by Glassman (Publication no. US 2001/0007308). It appears similar arguments are advanced in the same vain as the previous two rejections. While half of 14 has a pocket area Applicant argues areas 14a do not extend to the bottom area of the package or allow the package to stand upright. As the Federal Circuit has observed, "the name of the game is the claim," *In re Hiniker Co.*, 150 F.3d 1362, 1369, 47 USPQ2d 1523, 1529(Fed. Cir. 1998) and it is not seen where this is required of claims 1 or 2. Feet 38, 40 are disclosed in paragraph [0020] for allowing the package to stand in the upright position. It can also be deduced the feet must cooperate with the rest of the package to achieve this result. Therefor, "at least a portion of said outwardly projection" would manifestly have a depth sufficient to allow the body to stand substantially upright or feet 38, 40 would not be able to fulfill their function. Thus there is no apparent difference in this capacity.

With regard to the pocket area of Glassman (equivalent the additional outward portion in Applicant's claims) not extending to the bottom area (presumed to mean the additional portion of Glassman not having a depth *beyond* the first portion?), it is not seen where this is germane to

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the claimed subject matter. Nor does Applicant endeavor to explain how their claimed invention<sup>1</sup> is different than Glassman. Page 13 of Applicant's response states, with respect to Glassman;

"The bottommost portion of area 12a has feet 38 and 40 to allow the package to freely stand upright for displaying a product. Half 14 has pocket areas 14a but such do not extend to a bottom area of the package or allow the package to stand upright. Thus, Glassman does not teach each and every element of claims 1 and 2. Withdrawal of the rejection under 35 U.S.C. §102 is according requested."

As explained previously and herein, it is not seen where this provides any indication of what Applicant claims that is specifically different than Glassman. Accordingly, this rejection is maintained and made final

12. Claims 13 and 14 are amended to set forth a projecting portion equal in depth to a greatest depth in the first outward projecting portion to render said package self-indexing when said package is aligned with one or more packages. Page 11, lines 4-8 of the present invention discloses this parameter as providing "optimum indexing". Perkins (US Patent no. 4,781,289) is squarely on point. As previously pointed out the package Perkins is concerned with the problem of a self-supporting package. Moreover, Perkins discloses a back panel card with an attached "blister" having what can be characterized as a first outwardly projecting portion (22) in a bottom of the blister and an additional portion 20. As shown in the figures of Perkins the product receiving "additional portion" 20 is tapered and configured to receive the package object. This portion 20 extends from a flat surface of the blister to an outer most depth. Rather than speculating about relative dimensions, inherency or practical ranges in the execution of manufacturing Perkins recognizes the problems of the exact relationships disclosed in Applicant's invention.

Support structure 22 should be "comparable"<sup>2</sup> in depth to product enclosure 20, col. 3, lines 8 and 9 of Perkins. Which is stated to prevent the package of Perkins from falling over yet not occupy excessive shelf space, col. 3, lines 10-12. The implications of this teaching as would

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<sup>1</sup> Claims are to be given their broadest reasonable during prosecution, see *In re Priest*, 582 F.2d 33, 37 USPQ 11, 15 (CCPA 1978), and limitations from the specification will not be read into the claims, see, e.g. *In re Prater*, 415 F.2d 1393, 1404-1405, 162 USPQ 541, 550-51 (CCPA 1969). Office personnel are to give claims their broadest reasonable interpretation in light of the supporting disclosure. *In re Morris*, 127 F.3d 1048, 1054-55, 44 USPQ2d 1023, 1027-28 (Fed. Cir. 1997), see MPEP 2106.

<sup>2</sup> Similar, equivalent; equivalent- equal in value *American Heritage Dictionary*.

have been understood by anyone skilled in the art appear unmistakable. Perkins basically implies product and support portions should be comparable in depth so that when these packages are placed in adjacent, back to front, positions the blister top and bottom portions (20, 22) extend no greater extent than one another. Applicants' claims 13 and 14 reciting the corresponding portion 20, 22 of Perkins equal to one another appears anticipated by the disclosure of Perkins as would have been gleaned by the skilled artisan. Furthermore, the resultant teaching of Perkins is the optimum "self-indexing" of the present disclosure. Particularly when Perkins recognizes the comparable depths of the blister portions not occupying unnecessary shelf space. That is, if the base 20 of Perkins were deeper than product portion 22, or vice versa, more lateral shelf space would be required that for a product package having blister portions 20, 22 of equal depth. To optimize these two values Perkins envisions the claimed subject matter. At least to the Examiner. It is pointed out the hallmark of obviousness is anticipation, i.e., to say that a thing is not new is to also say it is obvious. A judicial review and subsequent finding of anticipation would not obviate the holding of this rejection under the statute of 35 U.S.C. 103(a).

To the extent that that such is not seen, it would have been obvious to one of ordinary skill in this art.. Therefore, claims 13 and 14 were rejected under 35 U.S.C. 103(a). The blatant implication of Perkins appears so obvious the skill is vacated for common sense. Make product portion 20 of Perkins excessively larger than support 22 and what happens? The package will fall over. Make the support 22 excessively large compared to product portion 20 and what happens? Unnecessary (and presumably valuable) shelf space is wasted for a given product portion 20. What does Perkins say? Make these two portions (20, 22) comparable and you have a package that won't fall over nor will the package occupy valuable, unnecessary shelf space.

Does "comparable" mean "equal", "exact" or "the same"? Perhaps. The Examiner can cite dictionary definitions leading one to this conclusion and maybe Applicant can achieve the opposite. Does "comparable" mean "equal" to one skilled in the art? The Examiner does not have the resources to pursue this avenue and even if Applicant is given the benefit of "comparable" not meaning "equal" at the end of the day, a determination of obviousness is not predicated on these findings. The rationale to modify or combine the prior art does not have to be expressly stated in the prior art; the rationale may be expressly or impliedly contained in the prior art or it may be reasoned from knowledge generally available to one of ordinary skill in the

art, established scientific principles, or legal precedent established by prior case law. In re Fine , 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988), see M.P.E.P. §2144.

In this regard it is not agreed the Examiner is establishing obviousness on the unknown, citations on page 14 of the response. Rather, the conclusion is based upon a rationale reasoned from the direction Perkins is leading. It does not take expert testimony or excessive discovery to appreciate that the making the product portion 20 and support structure 22 equal is a mere extrapolation of the Perkins teaching. An educated layperson can appreciate having two equal depth portions 20, 22 accommodates the product with the least excessive protrusion of support 22. Simply based on the relevant concepts and pertinent teachings in Perkins. And this dimensional construction of Perkins is no different than Applicant's self-indexing package alignment. Otherwise stated, Perkins' desire not to use unnecessary valuable shelf space by leading one skilled in the art to make portions 20 and 22 of equal depth has the effect of creating an organized, indexed appearance. Accordingly, there is no distinction here.

### ***Summary***

13. The self-indexing feature of the present invention relates to a product that is well developed in the art. Blister packs are well known to be constructed of various sizes, shapes or dimensions. Because blister packages can be molded from a thermoplastic material, these products readily lend themselves to such adaptations. Since the visual appearance of these products are important in providing an aesthetic appearance enhancing sale of the product, there are also a sundry products evidence by the significant design art collection (rarely can one ascribed complete anticipation of a utility application from a design disclosure). Finally, blisters with the aforementioned features lending itself to the present invention has been known in this art for almost 20 years. Perkins was filed in 1987. It is submitted the finding that Applicant's invention fails to provide a patentable invention represents a reasonable conclusion established upon the substantial evidence provided herein.

### ***Conclusion***

14. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

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A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

15. Any inquiry concerning this communication or earlier communications from the examiner should be directed to David T. Fidei whose telephone number is (571) 272-4553. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mickey Yu can be reached on (571) 272-4562. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



David T. Fidei  
Primary Examiner  
Art Unit 3728

dtf  
September 13, 2006